No. 94-2097

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THOMAS SHANNON and CRAIG BROOKS,

Petitioners,

vs.

CITY OF COSTA MESA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO WRIT OF CERTIORARI CITY OF COSTA MESA, CHIEF DAVID SNOWDEN, SGT. DURHAM, SGT. SANTEE AND OFFICER McCARTHY

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in granting Respondents' motion for summary judgment.

2. Whether the district court abused its discretion in denying Petitioner Shannon's Motion for Relief pursuant to F.R.C.P. 59 and 60.

3. Whether Respondents' motion for summary judgment should be affirmed as no genuine issue of material fact exists.

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STATEMENT OF THE CASE

1. Nature of the Case.

Petitioner Shannon was arrested on June 29, 1991, in the City of Costa Mesa (AER 1). Costa Mesa Police Officer McCarthy was driving in a marked police car at approximately 4:26 a.m. when he observed Petitioner driving a car at a high rate of speed and running red lights (AER 166). Thereafter, Petitioner drove up onto the grass in front of a Deli and exited the car (AER 166). Officer McCarthy yelled "stop – police". Petitioner did not comply and, instead, ran westbound to the rear of the Deli (AER 166). Officer McCarthy pursued Petitioner on foot, again yelling "stop – police" (AER 160). Petitioner climbed over a six foot high wooden fence and into a drainage ditch (AER 166). He then climbed a six foot high chain link fence which had barbed wire on top (AER 167). Petitioner proceeded to climb over a wrought-iron gate, approximately seven to eight feet tall with pointed spikes on top (AER 167). Officer McCarthy observed Petitioner on top of a block wall fence before he dropped over into the backyard of the residence at 2820 Drake Street (AER 167).

Officer McCarthy discontinued his chase and shortly thereafter, Costa Mesa Police Officer, Sgt. Santee arrived at the scene with additional Costa Mesa Police officers and established a perimeter (AER 167). The passenger in Petitioner's car told the officers that Petitioner ran because there was a warrant for his arrest and that he had been drinking (AER 167). She also provided the officers with Petitioner's name and date of birth (AER 167). Sergeant Durham at the Costa Mesa Police station heard this

information, ran an in-house records check, and found that Petitioner had two prior arrests for armed robbery and one for burglary (AER 167). Sgt. Durham broadcasted Petitioner's prior criminal history to the officers at the scene (AER 167).

Based upon the foregoing information, the fact that Petitioner had gone to great lengths to evade and resist Officer McCarthy, and the fact that Petitioner may have been hiding with a weapon among the dense foliage in a large, unlit residential backyard at night, Sgt. Santee, for the safety of his officers and residents of nearby homes, requested that a Canine Officer be located to aid in the search for Petitioner (AER 156, 167). City of Santa Ana Police Officer Letizio and his dog, Rex, responded to the request (AER 156). After his arrival and discussion with Sgt. Santee, Santa Ana Police Officer Letizio decided to use the dog to search for Petitioner (AER 156).

Officer McCarthy spoke with the resident of 2820 Drake who indicated no one had permission to be in his backyard (AER 168). The resident then gave the officers permission to search his backyard for Petitioner (AER 168). Officers Letizio and McCarthy entered the backyard through the gate, stopping inside the gate in a position of cover (AER 168). Canine announcements were made by Santa Ana Police Officer Letizio for Petitioner to surrender and the dog would not be released (AER 168). When no response was heard after thirty seconds, Santa Ana Police Officer Letizio released the dog (AER 168). The canine located Petitioner hiding against a block wall in an area covered by Oleander bushes (AER 168, 172). Petitioner and the dog exited the bushes and rolled on the ground (AER 173). Petitioner was fighting and punching

the dog, who had a bite hold on his right elbow (AER 173). Officer Letizio ordered Petitioner to stop fighting the dog, however, Petitioner continuously ignored Officer Letizio's repeated orders (AER 173). Both officers kept their distance until Petitioner complied with Officer Letizio's request and showed his hands (AER 174). At that time, the dog was taken off the bite (AER 174). Petitioner was arrested for driving under the influence, evading a police officer and resisting arrest (AER 165). He was treated at the scene by Costa Mesa Fire Paramedics and subsequently transported to Western Medical Center for further treatment (AER 174).

2. Procedural History

On June 24, 1992, Petitioners Thomas Shannon and Craig Brooks filed and served their First Amended Complaint alleging a violation of their civil rights pursuant to 42 U.S.C. § 1983. (AER 7) In addition to their federal civil rights claims, Petitioners also alleged pendent state claims which were dismissed by the District Court on December 23, 1992 (AER 27).

Among the Defendants named in the Complaint were the City of Costa Mesa, Costa Mesa Chief of Police, David Snowden, and Costa Mesa Police Officers Sgt. Durham, Sgt. Santee and Officer McCarthy (AER 7). Also named as Defendants were the City of Santa Ana, its Chief of Police, Dave Walters, and Officer Letizio (AER 7). The First Amended Complaint was amended a second time to add additional Santa Ana Police Officers as defendants (AER 741).

The alleged civil rights violations of the two Petitioners, Shannon and Brooks, involved different facts, circumstances, and incidents which occurred on two different days (AER 165, 289). Furthermore, no City of Costa Mesa Police Officers were present at, or participated in, the arrest of Petitioner Brooks (AER 289). On or about November 16, 1992, the District Court determined that Petitioners Shannon and Brooks were misjoined and ordered the matters severed pursuant to FRCP 20 and 21 (Appellees' supplemental excerpt of record 4 hereinafter "ASER".) Thereafter, Petitioner Shannon filed his Third Amended Complaint. (ASER 19)

On or about May 3, 1993, Respondents City of Costa Mesa, Chief David Snowden, Sgt. Durham, Sgt. Santee and Officer McCarthy (hereinafter "Respondents") filed and served upon Petitioner Shannon (hereinafter "Petitioner") a Motion for Summary Judgment which was scheduled to be heard on May 24, 1993 (AER 152). According to Local Rule 76, Petitioner had until May 10, 1993 to file and serve an Opposition to said motion. No Opposition was filed by Petitioner on May 10, 1993, and on May 12, 1993, the Court vacated the May 24, 1993 hearing date and granted Respondents' Motion for Summary Judgment in its entirety. (AER 201) On May 13, 1993, Petitioner brought an Ex Parte Application for Leave to File Late Opposition to Respondents' Motion for Summary Judgment. (AER 212) The Court denied the Ex Parte Application and rejected Petitioner's Opposition to Respondents' Motion for Summary Judgment and Separate Statement of Genuine Issues of Fact. (AER 239)

Previously, on or about April 14, 1993, the City of Santa Ana, its Chief of Police, Dave Walters, and Officers

Letizio, Fleet, Luna and Bretagna filed and served upon Petitioner their Motion for Summary Judgment (AER 37). The attorneys for the City of Santa Ana and its Officers neglected to include Santa Ana's Chief of Police and the Respondent officers in the Notice of Motion. Thereafter, on May 5, 1993, the City of Santa Ana and its Respondent officers filed an Amended Notice of Motion for Summary Judgment (AER 144 & 148). The only change was the addition of Officers Letizio, Fleet, Luna and Chief Walters in the Notice of the Motion (AER 146). On May 12, 1993, the Court granted the Motion for Summary Judgment brought on behalf of the Santa Ana Police Officers on the grounds of qualified immunity, and continued the Motion for Summary Judgment as to the City of Santa Ana and Chief Walters. (AER 202) The City of Santa Ana and Chief Walters brought a Second Motion for Summary Judgment addressing all causes of action against them. This second Motion for Summary Judgment was granted. (AER 324)

On or about June 4, 1993, Petitioner filed a Motion for Reconsideration of Judge McLaughlin's May 12, 1993 Orders granting Respondents' Motion for Summary Judgment and the Motion for Summary Judgment filed by the Santa Ana Police officers (AER 240). This Order was affirmed. (AER 323)

Judgment in the Motion for Summary Judgment filed by the Respondents was entered on July 1, 1993 (ASER 28). Thereafter, Petitioner filed a Motion for Relief, pursuant to Federal Rules 59 and 60, to set aside these judgments. (AER 655) This motion was denied (AER 736).

Petitioners appealed the District Court's Order of July 1, 1993, granting the Motion for Summary Judgment

filed by Respondents as to Petitioner Shannon's federal civil rights causes of action. The Ninth Circuit Court of Appeals reviewed the District Court's granting of the Motion for Summary Judgment *de novo*, and on February 3, 1995 the Court affirmed the Order of the District Court. On March 22, 1995, the Ninth Circuit Court of Appeals denied Petitioners' Petition for Rehearing and rejected Petitioners' suggestion for hearing en banc. Petitioners are now appealing the order of the Ninth Circuit Court of Appeals.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT SHOULD CONSIDER THE QUESTIONS PRESENTED WITH RESPECT TO APPELLANT SHANNON ONLY AND SHOULD DISREGARD THE SECOND QUESTION PRESENTED

As previously indicated in the Statement of Facts herein, on November 16, 1992 the District Court ordered that the complaints of Petitioners Shannon and Brooks be severed. However, Petitioners Shannon and Brooks have repeatedly ignored this court order, and have filed the instant Petition for Writ of Certiorari ("Petition") as if they were still joined. Respondents respectfully request that Court consider the Questions Presented with respect to Petitioner Shannon only, pursuant to the order of severance issued by the District Court.

The second Question Presented in the Petition relates to the appeal of Petitioner Brooks only, who had already been placed under arrest at the time of the canine search,

and is therefore inapplicable to the Petition against Respondents herein. Therefore, Respondents request that the court decline to consider the second Question Presented with respect to these Respondents.

II. THE COURT FULLY CONSIDERED AND CORRECTLY DECIDED WHETHER RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY

As the Appellate Record reflects, the District Court granted Respondents' Motion for Summary Judgment. Petitioner appealed the District Court's Order granting Summary Judgment, and said appeal was heard in the Ninth Circuit Court of Appeals. A grant of summary judgment is reviewed *de novo. Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-90 (9th Cir. 1989); *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

Entry of summary judgment is proper against a party who, "after adequate time for discovery," fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial." *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Subsequent to its *de novo* review, the Ninth Circuit upheld the District Court's order granting Respondents' Motion for Summary Judgment. The Ninth Circuit reviewed the factors set forth in *Graham v. Conner*, 490 U.S. 386 (1989) and held that "[r]eview of the *Graham* factors leads to the same conclusion. The most important element, 'whether the suspect poses an immediate threat to the safety of the officers or others,' *Chew [vs. Gates*, 27 F.3d 1432 (9th Cir. 1994)], 27 F.3d at 1441, weighs against Shannon." Petitioner's Appendix Page A-7.

The Ninth Circuit in its *de novo* review considered the appellate record, the briefs submitted by Petitioners and Respondents, and oral argument from all parties. Subsequent to this review, the Ninth Circuit upheld the granting of the Motions for Summary Judgment brought by Respondents herein and by the City of Santa Ana and its employees. The Ninth Circuit was not obligated to expound upon each and every document or declaration it considered, and committed no error when it scrupulously reviewed Petitioner's evidence and upheld the Order of the District Court granting Summary Judgment in favor of respondents herein. Respondents therefore respectfully urge the Court to deny Petitioner's Petition for Writ of Certiorari.

III. SHANNON'S ARGUMENT POSITED IN HIS FIRST QUESTION PRESENTED IS WITHOUT MERIT AND IS POSED FOR THE FIRST TIME HERE ON APPEAL

Petitioner Shannon's first Question Presented presupposes that the court below determined that the use of

a police canine under the circumstances presented to respondents constituted a "novel use of a weapon" which violated "the lethal force rule of *Tennessee v. Gardner*, 471 U.S. 1 (1985)" and subsequently ruled that respondents were entitled to qualified immunity. Petitioner Shannon also presupposes that the use of a trained police canine to search for hidden subjects constitutes a "novel use of a weapon," or is even considered a "use of force" subject to *Gardner*.

Indeed, one of Shannon's "questions presented" to the Ninth Circuit was whether *Tennessee v. Gardner* applied to the use of a canine. Thus, on appeal Shannon argued that the use of trained police canines to search for concealed subjects **should** be subject to *Gardner;* here on appeal he leaps forward a step and states for the first time that such use **is** subject to *Gardner*. Shannon has crafted a new question comprised of selected portions of his appellate record. However, this question was not raised on appeal and is without merit.

The court never ruled that the use of a trained police canine to search for hidden suspects constitutes deadly force. Petitioner has made yet another leap – that such use of a canine constitutes excessive force.

IV. THE THIRD QUESTION PRESENTED, OF WHETHER A CONSTITUTIONAL RIGHT OF SELF DEFENSE EXISTS, WAS NOT RAISED OR PRESERVED BELOW

Petitioner Shannon did not raise any arguments pertaining to the existence of a "constitutional right of self-defense" on appeal. Because Petitioner did not raise this

argument below, he has waived his right to raise it now for the first time. Respondents request that the Court deny certiorari to the issue raised in the third Question Presented.

V. THE COURT SHOULD DENY CERTIORARI TO REVIEW THE FOURTH QUESTION PRESENTED IN PETITIONER SHANNON'S PETITION BECAUSE THE NINTH CIRCUIT COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE PERTAINING TO THE EVIDENCE PRESENTED BY PETITIONER IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Petitioner argues that the Ninth Circuit "blithely disregarded" (Petition p. 25) the expert declarations and suggests that they are "ignorant of reality and apparently relying on "Lassie" reruns and wishful thinking" (Petition p. 28) when the court held that Petitioner's expert declarations were insufficient to defeat respondents' Motion for Summary Judgment. However, contrary to Petitioner's allegations, the Ninth Circuit carefully considered the expert declarations.

Indeed, the Ninth Circuit specifically noted the declarations were *inadmissible*, but that "[e]ven if the district court erred in concluding that the declarations of Peter Meade, M.D., and Van Ness Bogardus, II, were inadmissible, **they are insufficient to withstand the summary judgment motions in these cases.**" (Emphasis added; Petitioner's Appendix to Petition p. A-9.)

The Ninth Circuit upheld the District Court's determination that the declarations were inadmissible. Indeed,

the Declarations of Dr. Meade and Mr. Bogardus were not part of Petitioner's Opposition to Respondents' Motion for Summary Judgment. Respondents urged the Ninth Circuit Court of Appeal to decline to consider these declarations, as a Court of Appeals inquiry is limited to the summary judgment record before the trial court, and parties cannot add exhibits, depositions, or affidavits to support their positions on appeal. *Topalian v. Ehrman* (5th Cir. 1992) 954 F.2d 1125, 1131.

In their *de novo* review of the District Court's Order granting Summary Judgment, the Ninth Circuit reviewed arguments by both Petitioner and respondents pertaining to the admissibility and weight of the declarations. In his Petition for Writ of Certiorari, Petitioner improperly attempts to obfuscate the Court from the question of *why* the court should review this matter with emotional appeals concerning nightmares suffered by concentration camp survivors and references to television shows.

Petitioner offers no evidence to support his contention, that the court improperly failed to consider the inadmissible declarations of Dr. Meade and Mr. Bogardus, even though their declarations contained no evidence of whether the use of the canine in the case at bar was reasonable according to the courts' decisions in *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) and *Chew v. Gates*, 27 F.3d 1432, 1447-1449 (9th Cir. 1994). Rather, Petitioner offers only conclusory statements pertaining to dog bite injuries in general and use of force policies at other police departments. For example, the Declaration of Mr. Bogardus failed to set forth any specific facts alleging that any of the officers' actions were "objectively unreasonable" or otherwise were in violation of the Costa Mesa

or Santa Ana Police Department policies, which is required in an analysis of reasonable behavior pursuant to *Graham*.

Petitioner has set forth no law which would require the Ninth Circuit to draft a lengthy dissertation of its decision to uphold the District Court's determination that the declarations proffered by Petitioner were insufficient to defeat respondents' Motion for Summary Judgment. The Ninth Circuit's decision, issued subsequent to its *de novo* review of the District Court's Order, should not be disturbed.

CONCLUSION

For the foregoing reasons, Respondents City of Costa Mesa, Chief David Snowden, Sgt. Durham, Sgt. Santee and Officer McCarthy respectfully request that the Court deny Petitioner Shannon's Petition for Writ of Certiorari.

Respectfully submitted,

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J. ROBERT FLANDRICK

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